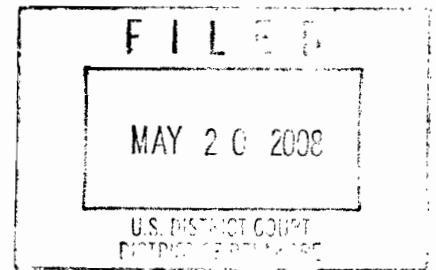


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ELTON L. PUMPHREY
v.
STATE OF DELAWARE

CASE NUMBER:
0002014519

18 297



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MEMORANDUM OF LAW IN
SUPPORT OF PETITION UNDER
28 U.S.C. § 2254 FOR WRIT
OF HABEAS CORPUS

THE DEFENDANT, ELTON LEROY Pumphrey, PETITIONER, pro se, MOVES THIS HONORABLE COURT PURSUANT TO 28 U.S.C. § 2254, (HABEAS CORPUS) TO REVERSE HIS CONVICTION ON THE CHARGES OF: CONSPIRACY IN THE SECOND DEGREE, TITLE 11, SECTION 512(1); THEFT \$1,000 OR GREATER, TITLE 11, SECTION 841; FAILURE TO TAKE PHOTOGRAPHS AND FINGERPRINTS, TITLE 11, SECTION 8522, BASED ON THE CONSTITUTIONAL VIOLATIONS AND / OR ERRORS OF LAW AS STATED IN THE ATTACHED PETITION FOR WRIT OF HABEAS CORPUS. THIS IS THE DEFENDANT'S (PETITIONER)

MEMORANDUM OF LAW IN SUPPORT OF his REQUEST FOR RELIEF.

GROUND ONE:

PETITIONER STATES THAT his SIXTH AMENDMENT right TO CONFRONT ACCUSATORY WITNESSES GUARANTEED by THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE DELAWARE CONSTITUTION ARTICLE 1 SECTION 7 WERE VIOLATED during his Trial.

SUPPORTING FACTS:

During PETITIONERS TRIAL THE STATE INTRODUCED INTO EVIDENCE OUT-OF-COURT STATEMENTS by THE ABSENT WITNESS (KOVATTO), Through THE POLICE OFFICERS, THE MEDICAL STAFF AND/or PARAMEDIC AND OTHER WITNESSES (SEE TRIAL TRANSCRIPTS). IN THE JUDGES CHAMBERS BEFORE TRIAL, THE JUDGE ALLOWED THE PROSECUTING ATTORNEY TO PROSECUTE THIS CASE WITHOUT THE ACCUSATORY WITNESS PRESENT AND did so WITH THE UNDERSTANDING THAT THE PROSECUTING ATTORNEY would NOT USE OUT-OF-COURT STATEMENTS MADE by THE ACCUSATORY WITNESS, TO A POLICE OFFICER AND PARAMEDIC ECT. (SEE TRANSCRIPTS OF JUDGE CHAMBERS CONVERSATION).

THESE OUT-OF-COURT STATEMENTS WERE ALLOWED
by THE TRIAL JUDGE AND PETITIONERS COUNSEL
who did NOT object.

THE FAILURE To object WAS CRITICAL TO
PETITIONERS CASE AND THE ERROR RENDERED
THE TRIAL FUNDAMENTALLY UNFAIR (SEE
TRIAL TRANSCRIPTS).

PETITIONER SHOULD HAVE BEEN ALLOWED TO USE
THE ACCUSATORY WITNESSES STATEMENTS THAT
HE HAD MADE UNDER OATH AT A PRELIMINARY
HEARING (SEE PRELIMINARY HEARING TRANSCRIPTS)
OF WHICH WERE MORE RELIABLE THAN TO A
POLICE OFFICER AND PARAMEDIC ETC.

HAD THESE ERROR'S NOT OCCURRED IT IS
REASONABLE To BELIEVE THAT A DIFFERENT
OUTCOME WOULD HAVE OCCURRED.

DUE TO THE ABSENCE OF THE ACCUSATORY
WITNESS AT TRIAL, IT PUT THE PETITIONERS
DEFENSE AT A ACTUAL AND SUBSTANTIAL
DISADVANTAGE BECAUSE PETITIONER WAS
NOT ALLOWED TO USE THIS WITNESSES
PRIOR STATEMENTS.

IF THIS WITNESS WAS PRESENT AND/OR HIS
STATEMENTS WERE USED AT TRIAL BY PETITIONER
(SEE ALL POLICE REPORTS AND PRELIMINARY
HEARING TRANSCRIPTS), THE POSSIBILITY THAT
INCONSISTENCIES BETWEEN THE STATEMENTS
AND THE DIRECT TESTIMONY WOULD HAVE

ENABLED AN EFFECTIVE CROSSEXAMINATION TO DEMONSTRATE THAT PETITIONER IS ACTUALLY INNOCENT.

THE TRIAL COURT'S IMPROPER ADMISSION OF EVIDENCE (OUT-OF-COURT STATEMENTS AND PICTURES OF THE ABSENT WITNESSES INJURIES) VIOLATED PETITIONERS FEDERAL AND STATE CONSTITUTIONAL RIGHT. (SEE TRIAL TRANSCRIPTS)

THE PETITIONER MAINTAINS THAT THE ADMISSION OF THE ABSENT WITNESSES PHOTOGRAPHS EXPOSED THE JURY TO EVIDENCE WHICH WAS HIGHLY PREJUDICIAL AND INFLAMMATORY. DEFENDANT INSISTS THAT ANY PROBATIVE VALUE OF SUCH EVIDENCE WAS OUTWEIGHED BY THE PREJUDICE INVOLVED. D.R.E. 403.

THE ADMISSION OF TESTIMONY CONCERNING THE ACCUSATORY WITNESS'S OUT-OF-COURT STATEMENTS CONSTITUTED REVERSIBLE ERROR BECAUSE THE EVIDENCE DID NOT QUALIFY FOR ADMISSIBILITY PURSUANT TO 11 DEL.C. § 3507.

DURING TRIAL, THE TRIAL COURT ADMITTED INTO EVIDENCE THE PRIOR OUT-OF-COURT STATEMENTS MADE BY THE ABSENT WITNESS, THROUGH THE POLICE OFFICERS AND PARAMEDIC ETC. (SEE TRIAL TRANSCRIPTS)

THE WITNESS MUST TESTIFY AS TO CONTENTS OF HIS OUT-OF-COURT STATEMENT TO BE ADMISSIBLE UNDER § 3507. RAY V. STATE, DEL. SUPR., 587 A.2d 439 (1991).

PETITIONER ARGUES THAT THE ADMISSION OF THESE STATEMENTS WAS IN ERROR BECAUSE SECTION 3507 REQUIRES THE STATE TO ELICIT TESTIMONY FROM THE WITNESS ON DIRECT EXAMINATION AS TO THE CONTENTS OF HIS OUT-OF-COURT STATEMENTS AND WHETHER THOSE STATEMENTS WERE TRUE. SEE JOHNSON V. STATE, DEL. SUPR., 338 A.2d 124, 126-27 (1975).

(PETITIONER WAS DENIED HIS RIGHT TO CONFRONT HIS ACCUSER)

THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION GIVES A DEFENDANT THE RIGHT TO CONFRONT AND CROSSEXAMINE ADVERSE WITNESSES. AKINS V. UNITED STATES, 679 A.2d 1017, 1021 (D.C. 1996); RAY V. UNITED STATES, 620 A.2d 860, 862 (D.C. 1993).

A DEFENDANT'S RIGHT TO PRESENT A DEFENSE AND CONFRONT HIS OR HER ACCUSERS CAN BE IMPEDED NOT ONLY BY AN UNDULY RESTRICTIVE TIME LIMITATION ON CROSSEXAMINATION, BUT ALSO BY THE ADMISSION OF INCORRECTLY-INTERPRETED WITNESS TESTIMONY. BASSIL V. UNITED STATES, 517 A.2d 714, 716 (D.C. 1986).

THE right TO OFFER THE TESTIMONY OF WITNESSES... is in plain terms THE right TO PRESENT A DEFENSE... This right is a FUNDAMENTAL ELEMENT OF DUE PROCESS OF LAW. "AT TIMES, THE right TO CONFRONTATION AND THE right TO PRESENT A DEFENSE INTERSECT," WASHINGTON V. TEXAS, 388 U.S. 14, 18, 87 S.C.T. 1920, 1923, 18 L.Ed.2d 1019 (1967). THIS PETITIONER WAS UNABLE TO EXPLORE WITH "FULL AND FAIR" CROSSEXAMINATION AT HIS TRIAL.

PETITIONER ARGUES THAT THE TRIAL COURT COMMITTED REVERSIBLE ERRORS.

THE UNITED STATES AND DELAWARE CONSTITUTIONS PROVIDE IN PERTINENT PART:

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE right... TO BE CONFRONTED WITH WITNESSES AGAINST HIM... U.S. CONST. AMEND. VI. AND IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED HATH A right... TO MEET THE WITNESSES IN THEIR EXAMINATION FACE TO FACE... DEL. CONST. ART. I, § 7.

THE DEFENDANT POINTS TO THE EVIDENCE AT TRIAL TRANSCRIPTS WITH NO EXACT LOCATION, AT PAGE OR LINE PARAGRAPH,

DUE TO THE FACT, THAT THE COURT WOULD NOT ALLOW THE DEFENDANT TO OBTAIN THEM. IF THE TRANSCRIPTS ARE NEEDED AFTER SUCH FILING OF THIS HABEAS CORPUS, THE COURT SHOULD OBTAIN SUCH, FOR A DECISION.

AT THIS TIME, SUCH TRANSCRIPTS ARE VERY MUCH NEEDED AND THE DEFENDANT REQUESTS THAT THE COURT NOW OBTAIN THEM.

GROUND TWO:

THE DEFENDANT'S CONVICTION FOR CONSPIRACY IS INVALID ABSENT A CONVICTION FOR THE UNDERLYING OVERT ACT OF ROBBERY.

SUPPORTING FACTS:

DEFENDANT WAS ACQUITTED OF ROBBERY IN THE FIRST DEGREE AND WAS CONVICTED OF CONSPIRACY IN THE SECOND DEGREE.

NO OTHER PERSON WAS INDICTED FOR ROBBERY.

FOR CONVICTION UNDER 11 DEL. C. 512 IT IS

REQUIRED THAT "THE PERSON OR ANOTHER PERSON WITH WHOM THAT PERSON CONSPIRED COMMITS AN OVERT ACT IN PURSUANCE OF THE CONSPIRACY".

11 DEL.C. 301(b) PROVIDES IN PERTINENT PART: "NO PERSON MAYBE CONVICTED OF AN OFFENSE UNLESS EACH ELEMENT OF THE OFFENSE IS PROVED BEYOND A REASONABLE DOUBT".

THE JURY ACQUITTED THE DEFENDANT OF ROBBERY IN THE FIRST DEGREE, WHICH WAS THE UNDERLYING OVERT ACT OF THE CONSPIRACY CHARGE. SINCE THE INDICTMENT DID NOT CHARGE THAT A PERSON OTHER THAN THE DEFENDANT COMMITTED THE OVERT ACT, AND THERE WAS NO CONVICTION OF THE DEFENDANT ON THAT CHARGE, THE CONVICTION ON THE CONSPIRACY CHARGE CANNOT STAND. (SEE ATTACHED EXHIBIT HOLLAND v. STATE, DEL. SUPR., 744 A.2d 980 (2000).)

BASED ON THE INCONSISTANCY OF THE VERDICTS DESCRIBED ABOVE, THE DEFENDANT CONTEND THAT THE CONVICTION FOR CONSPIRACY IN THE SECOND DEGREE IS REVERSABLE ERROR AND, THEREFORE, PETITIONS THE COURT TO REVERSE THE CONVICTION.

GROUND THREE:

DEFECTIVE AND/OR IMPROPER JURY
INSTRUCTIONS.

SUPPORTING FACTS:

DURING JURY DELIBERATIONS, THE JURY
HAD A QUESTION REGARDING THE CHARGE
OF CONSPIRACY. THE JURY WAS BROUGHT
BACK INTO THE COURTROOM. THE JURY'S
QUESTION WAS, "IF WE FIND MR. PUMPHREY
NOT GUILTY OF ROBBERY, CAN WE FIND
MR. PUMPHREY GUILTY OF CONSPIRACY?
THE JUDGE'S RESPONSE TO THE QUESTION
WAS, "SURE...", ETC. (SEE TRIAL TRANSCRIPT
FOR HIS COMPLETE RESPONSE.)

THE JUDGE'S RESPONSE TO THE QUESTION
WAS IN CONTRADICTION TO THE LAW AS STATED
IN 11 DEL.C. 512. HAVING RECEIVED THIS
ERRONEOUS INSTRUCTION, THE JURY
SUBSEQUENTLY RETURNED A VERDICT OF
"NOT GUILTY" ON THE CHARGE OF ROBBERY
IN THE FIRST DEGREE AND "GUILTY" ON
THE CHARGE OF CONSPIRACY IN THE
SECOND DEGREE.

IN JURY INSTRUCTIONS THE DEFENDANT IS
ENTITLED TO THE CORRECT STATEMENT

OF THE LAW. (MILLER v. STATE, DEL. SUPR.,
224 A.2d 592 (1966).)

THE JUDGE'S INSTRUCTIONAL ERROR
AUTOMATICALLY CONSTITUTES "PLAIN ERROR"
REQUIRING REVERSAL OF CONVICTION.
(MINOR v. UNITED STATES, 475 A.2d 414,
416 (D.C. 1984).)

THE JUDGE'S ERRONEOUS INSTRUCTION "TO
THE JURIES QUESTION" REGARDING 11 DEL.
C. 512, IN EFFECT, REMOVED THE "OVERT ACT"
ELEMENT FROM THE JURY'S CONSIDERATION.
IN SO DOING, VIOLATED THE DEFENDANT'S
FOURTEENTH AMENDMENT RIGHT OF DUE
PROCESS REQUIRING TRIAL BY JURY ON
EVERY ESSENTIAL ELEMENT OF THE CRIME
CHARGED. (IN RE WINSHIP, 397 U.S. 358, 364
90 S.C.T. 1068, 25 L. ED. 2d 368 (1970); STATE V.
DELVECCHIO, 191 CONN. 412, 419, 464 A.2d
813 (1983); STATE V. ROGUE, 190 CONN. 143,
157, 460 A.2d 26 (1983).) SUCH VIOLATION
REQUIRES REVERSAL OF THE DEFENDANT'S
CONVICTION FOR CONSPIRACY IN THE
SECOND DEGREE. COUNT (4) ON THE
INDICTMENT.

GROUND FOUR:

THE DEFENDANT ARGUES HE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING TRIAL.

SUPPORTING FACTS:

AS DETAILED IN "GROUND ONE" WHICH PERTAINS TO ACCUSATORY WITNESSES, THE TRIAL JUDGE, IN CHAMBERS, DENIED THE USE OF OUT-OF-COURT STATEMENTS BY AN ABSENT WITNESS. NEVERTHELESS, DURING TRIAL THE PROSECUTION INTRODUCED INTO EVIDENCE THE OUT-OF-COURT STATEMENTS THROUGH TESTIMONY FROM POLICE, PARAMEDICS, AND MEDICAL STAFF.

COUNSEL FAILED TO OBJECT TO SUCH TESTIMONY AS BEING INADMISSABLE AND CONTRARY TO THE JUDGE'S INSTRUCTIONS IN CHAMBERS.
(SEE TRANSCRIPTS)

AS DETAILED IN "GROUND THREE" WHICH PERTAINS TO IMPROPER JURY INSTRUCTIONS, THE JUDGE ERRONEOUSLY RESPONDED TO A JURY QUESTION REGARDING CONVICTION ON THE CONSPIRACY CHARGE. AT THE TIME OF THE ERROR, THE DEFENDANT TOLD COUNSEL TO OBJECT. HE REFUSED AND SAID, "IT IS AN APPEAL ISSUE". COUNSEL'S FAILURE TO OBJECT TO THE JUDGE'S ERRONEOUS REPLY TO THE JURY'S QUESTION

AMOUNTED TO INEFFECTIVE ASSISTANCE
OF COUNSEL. (SEE TRANSCRIPTS)

HAD THESE ACTS OF OMISSION NOT OCCURRED
BY COUNSEL, IT IS REASONABLE TO BELIEVE THAT
THE OUTCOME OF THE TRIAL WOULD HAVE
BEEN DIFFERENT.

THEREFORE, THE DEFENDANT REQUESTS THE
COURT TO REVERSE THE CONVICTION OF
CONSPIRACY IN THE SECOND DEGREE ON THE
BASIS OF VIOLATION OF SIXTH AMENDMENT
RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

THE DEFENDANT POINTS TO THE EVIDENCE
IN TRIAL TRANSCRIPTS WITH NO EXACT
LOCATION AT PAGE OR LINE PARAGRAPH.
DUE TO THE FACT, THAT THE COURT WOULD
NOT ALLOW THE DEFENDANT TO OBTAIN
THEM. IF THE TRANSCRIPTS ARE NEEDED
AFTER SUCH FILING OF THIS HABEAS CORPUS,
THE COURT SHOULD OBTAIN SUCH, FOR A
DECISION.

AT THIS TIME, SUCH TRANSCRIPTS ARE VERY
MUCH NEEDED AND THE DEFENDANT RESPECT-
FULLY REQUEST THAT THE COURT NOW
OBTAINS THEM.

DEFENDANT'S MOTION IS BASED UPON ERRORS OF LAW, CONSTITUTIONAL VIOLATIONS AND INEFFECTIVE ASSISTANCE OF COUNSEL, WHEREIN HE MAINTAINS THAT HE HAD BEEN DEPRIVED OF SUBSTANTIAL AND MATERIAL CONSTITUTIONAL RIGHTS. THESE DEPRIVATIONS DESTROYED DEFENDANT'S ABILITY TO RECEIVE A FAIR TRIAL.

DEFENDANT ASKS THIS HONORABLE COURT TO HOLD A EVIDENTARY HEARING TO FAIRLY MAKE A RULING OF THE ARGUMENTS AT HAND.

THE LOWER COURTS DETERMINATION WAS OBJECTIVELY UNREASONABLE AND A VIOLATION OF FEDERAL LAW.

AS A RESULT THIS COURT SHOULD GRANT ME RELIEF.

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DELAWARE 19947
TELEPHONE (302) 856-5256

October 17, 2006

Elton L. Pumphrey
SBI No. 00185250
Sussex Correctional Institution
P.O. Box 500
Georgetown, DE 19947

Submitted
7-18-05

RE: State of Delaware v. Elton L. Pumphrey
Cr.A. No. 00-04-0160 - Theft
Cr.A. No. 00-04-0161 - Conspiracy in the Second Degree
Cr.A. No. 00-04-0162 - Failure to take Photographs and Fingerprints
Def. ID No. 00020114519

INCORRECT DATE

→ Date Submitted: July 1, 2006

Dear Mr. Pumphrey:

Your motion for postconviction relief is denied. According to Superior Court Criminal Rule 61 (a)(1), a motion for postconviction relief may be brought only by "a person in custody or subject to future custody under a sentence of this court" being challenged.¹ After I found you in violation of your probation on the above-referenced charges on November 8, 2002, I sentenced you to four years at Supervision Level V with no probation to follow. You were released on April 14, 2006. Thus, you are no longer in custody or subject to future custody under the sentencing order dated November 8, 2002.² Therefore, you do not have standing to pursue your claim under Superior Court Criminal Rule 61.

Very truly yours,



E. Scott Bradley

cc: Prothonotary's Office
Thomas D. H. Barnett, Esquire
Department of Justice

¹See *Epperson v. State*, 829 A.2d 935 (Table), 2003 WL 21692751 (Del. Supr.); *Summers v. State*, 818 A.2d 971 (Table), 2003 WL 1524104 (Del. Supr.); *Fullman v. State*, 746 A.2d 276 (Table), 2000 WL 140114 (Del. Supr.); *Guinn v. State*, 625 A.2d 279 (Table), 1993 WL 144874 (Del. Supr.); *Petsinger v. State*, 2002 WL 1558835 (Del. Supr.); *State v. Beles*, 1997 WL 366899 (Del. Supr.).

²Elton L. Pumphrey is now incarcerated and awaiting trial on charges that allegedly occurred on July 22, 2006.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELTON L. PUMPHREY,	§
	§
Defendant Below-	§ No. 580, 2006
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0002014519
Plaintiff Below-	§
Appellee.	§

Submitted: August 10, 2007

Decided: October 23, 2007

Before **HOLLAND, BERGER, and JACOBS**, Justices.

O R D E R

This 23rd day of October 2007, after careful consideration of the parties' briefs and record on appeal, we find it manifest that the judgment below should be affirmed on the basis of the Superior Court's well-reasoned decision dated October 17, 2006. The Superior Court did not err in concluding that appellant lacked standing to pursue a motion for postconviction relief because appellant had completed his sentence and thus was no longer "in custody or subject to future custody" under the sentence

for which postconviction relief was sought.¹ Moreover, given his lengthy criminal record, Pumphrey could not establish that he would suffer any collateral consequences as a result of the convictions he sought to challenge in his motion.² Accordingly, his motion for postconviction relief was moot.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:



Carolyn Beyer
Justice

¹ See Del. Super. Ct. Crim. R. 61(a)(1), which provides that a motion for postconviction relief may only be brought by “a person in custody or subject to future custody under a sentence” of the Superior Court.

² *Gural v. State*, 251 A.2d 344, 344-45 (Del. 1969).

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELTON L. PUMPHREY,	§
	§
Defendant Below-	§ No. 580, 2006
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0002014519
Plaintiff Below-	§
Appellee.	§

Submitted: November 6, 2007

Decided: November 15, 2007

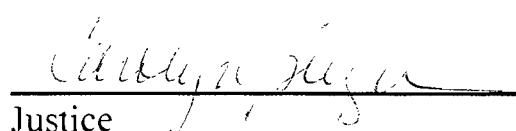
Before **STEELE**, Chief Justice, **HOLLAND**, **BERGER**, **JACOBS** and **RIDGELY**, Justices, constituting the Court *en Banc*.

O R D E R

This 15th day of November, 2007, the Court having carefully considered petitioner's Motion for Rehearing *en Banc* of the Court's Order dated October 23, 2007, and it appearing that the same should be denied;

NOW, THEREFORE, IT IS ORDERED that petitioner's Motion for Reargument or Rehearing *en Banc* be, and the same hereby is, DENIED.

BY THE COURT:



Justice William H. Justice

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELTON L. PUMPHREY § No. 580, 2006
§
v. § Superior Court
§
STATE OF DELAWARE § Sussex County
§
§ Cr. ID No. 0002014519

The following docket entry has been made in the above cause.

31. November 20, 2007. Record and mandate to Clerk of Court Below. **Case Closed.**

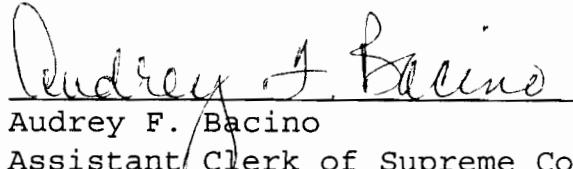
cc: The Honorable E. Scott Bradley
Mr. Elton L. Pumphrey
Loren C. Meyers, Esquire

Prothonotary
Received Above

By _____

Date _____

Date: November 20, 2007.


Audrey F. Bacino
Assistant Clerk of Supreme Court

M A N D A T E

THE SUPREME COURT OF THE STATE OF DELAWARE

TO: Superior Court of the State of Delaware in and for
Sussex County:

GREETINGS:

WHEREAS, in the cases of:

State of Delaware v. Elton L. Pumphrey

Cr. ID No. 00020114519

a certain judgment or order was entered on the 17th day of October 2006, to which reference is hereby made; and ***WHEREAS***, by appropriate proceedings the judgment or order was duly appealed to this Court, and after consideration has been finally determined, as appears from the Orders dated ***October 23, 2007***, and ***November 15, 2007***, certified copies of which are attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the orders or judgments be and are hereby affirmed.

Audrey F. Bacino
Audrey F. Bacino
Assistant Clerk of the Supreme Court

Issued: November 20, 2007

Supreme Court No. 580, 2006

STATE OF DELAWARE }
 }
 } ss.
KENT COUNTY }

I, Audrey F. Bacino, Assistant Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing are true and correct copies of the Orders dated October 23, 2007, and November 15, 2007, in **Elton L. Pumphrey v. State**, No. 580, 2006, as they remain on file and of record in said Court.

IN TESTIMONY WHEREOF,

I have hereunto set my hand and
affixed the seal of said Court at
Dover this 20th day of November A.D.
2007.

Audrey F. Bacino
Audrey F. Bacino
Assistant Clerk of Supreme Court

#16
CENW
7-5-0
CL

DELAWARE SUPREME COURT
IN THE SUPREME COURT OF THE STATE OF DELAWARE
FILED
2001 JUN 32 A 9:02

Elton Pumphrey : **NO DEPUTY CLERK
Defendant Below,
Appellant,**
vs. :
STATE OF DELAWARE :
Plaintiff Below,
Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

APPELLANT'S OPENING BRIEF ON APPEAL

DELAWARE SUPREME COURT
FILED
2001 JUL -2 A 10:29

DEPUTY CLERK
GEORGETOWN


Thomas D. H. Barnett, Esquire
I. D. No. 0994
512 East Market Street
Georgetown, DE 19947
(302) 855-9252

Attorney for Appellant

DATED: 7-2-01

EXHIBIT (1)

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS.....	ii
NATURE AND STAGE OF THE PROCEEDINGS	1
SUMMARY OF ARGUMENT	2
STATEMENT OF FACTS	3
ARGUMENT	5
A. STANDARD AND SCOPE OF REVIEW	5
B. MERITS OF ARGUMENT	6
CONCLUSION	10

Attachments:

Sentencing Order.....	B-1
Ruling Denying Victim's Presence at Trial.....	B-8
Continuance Requested.....	B-23

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Bassil v. U. S.</u> , D. C. App., 517 A. 2d 714 (1986).....	7
<u>Chambers v. Mississippi</u> , 410 U. S. 284.....	9
<u>Demby v. State</u> , Del. Supr., 695 A. 2d 1152 (1997).....	8
<u>Johnson v. State</u> , Del. Supr., 338 A. 2d 124 (1975).....	7
<u>People v. Barrera</u> , Mich. Supr., 547 N. W. 2d 280, 289..	9
<u>Smith v. State</u> , Del. Supr., 647 A. 2d 1083 (1994).....	8
<u>State v. Casiano</u> , R. I. Supr., 667 A. 2d 1233 (1995)...	8
<u>Wright v. State</u> , Del. Supr., 513 A. 2d 1310 (1986).....	7

<u>RULES</u>	
Delaware Rules of Evidence 804 (a)(4)(5).....	8
Delaware Rules of Evidence 803 (24).....	8

NATURE AND STAGE OF THE PROCEEDINGS

Defendant, Elton L. Pumphrey, (hereinafter Defendant) was charged with Robbery First Degree, Possession of a Deadly Weapon during the Commission of a Felony, Theft Felony, Conspiracy Second Degree, and Failure to Submit to Photographs and Fingerprints.

On October 24, 2000, Defendant was tried by a jury before the Honorable E. Scott Bradley in the Superior Court of the State of Delaware, in and for Sussex County. The Defendant was convicted of Theft Felony, Conspiracy Second Degree and Failure to submit to Photographs and Fingerprints. The Defendant was acquitted of all other charges.

On December 15, 2000, Defendant was sentenced as follows:

As to Criminal Action No. 00-04-0160, Theft Felony, 2 years Level 5 with credit for 165 days, suspended after serving six months, with the balance suspended for 18 months of Level 3 probation; as to Criminal Action No. 00-04-0161, Conspiracy Second Degree, 2 years Level 5, suspended for 2 years at Level 3 probation; As to Criminal Action No. 00-04-0162, Failure to Submit to Photographs and Fingerprints, 1 year at Level 5, suspended for 6 months at Level 3 following by 6 months at Level 2. All sentences were consecutive ordered to pay costs on all charges, plus restitution of \$1,753 to Sydney Arzt and \$4,693.50 to Nationwide Insurance Company.

SUMMARY OF ARGUMENT

The Trial Court should have allowed testimony that the Defendant had rented the car from Rocco Kovatto, even though the testimony was hearsay, as the exclusion deprived the Defendant of his right to confront and cross-examine the victim and required the Defendant to choose between exercising his Fifth Amendment right and testifying as to why he paid Kovatto the money.

Defendant in Ms. Arzt's vehicle. (A-21, 22, 23). Cpl. Troy Pezzuto of the Delaware State Police testified that Defendant refused to be processed at Troop 11 (A-24)

Tykesha Frazier (Frazier) testified that she was Defendant's cousin and that she saw Defendant give Korvatto money. (B-25) However, she was not allowed to testify as to why. (B-25-27)

Timothy Pumphrey, Defendant's brother, testified he also saw money exchanged (B-28) but he, too, was not allowed to testify as to why the money was paid.

A. STANDARD AND SCOPE OF REVIEW

This court reviews de novo the Superior Court's application of the law regarding hearsay testimony. Also, the Trial Court abused it's discretion in failing to balance the admissibility of evidence against the Constitutional rights of the Defendant. Sixth Amendment, United States Constitution.

B. MERITS OF ARGUMENT

An accused in a criminal proceeding is guaranteed the right to be confronted with the witnesses against him. Wright v. State, Del. Supr., 513 A. 2d 1310 (1986). In the instant case the State chose to proceed to trial without the victim Rocco Kovatto, who was in a rehabilitation program. The defense was not allowed to know his whereabouts in order to require his appearance. The State had requested a continuance, which was denied.

The confrontation clause and the hearsay rule exceptions are to insure the accuracy of trial testimony. Wright, supra. Cross-examination plays an essential role in the accused's Sixth Amendment right and is protected by the Fourteenth Amendment in state prosecutions. Johnson v. State, Del. Supr., 338 A. 2d 124 (1975).

And, although discretion is generally vested in the Trial Court with respect to the admissibility of evidence, that discretion must be weighed against the Defendant's right to confront witnesses and to present a defense. Bassil v. U. S., D. C. App., 517 A. 2d 714 (1986).

Further, the denial of the right to confront an accusatory witness may be satisfied, absent physical face-to-face

confrontation at trial, only where denial is necessary to further important public policy. (Emphasis Added.) State v. Casiano, R. I. Supr., 667 A. 2d 1233 (1995).

In the instant case the Trial Court should have allowed hearsay testimony when it forced the Defendant to proceed to trial without the presence of Kovatto.

In Smith v. State, Del. Supr., 647 A. 2d 1083 (1994), it was held that a statement offered as evidence of a material fact that is more probative than any other evidence the proponent can procure should be admitted when the Rules and the interests of justice are served by the admission into evidence. Further, an exception exists when the witness is unable to be present or testify because of a physical illness or infirmity and the proponent was unable to procure his attendance. Delaware Rule of Evidence 804 (a)(4)(5).

In Demby v. State, Del. Supr., 695 A. 2d 1152 (1997), this Honorable Court addressed the residual hearsay exception of D.R.E. 803(24), holding that the exception provides that a statement not specifically covered by any of the other exceptions in D.R.E 803 but "having equivalent circumstantial guarantees of trustworthiness" will not be excluded by the hearsay rule. However, the court must first determine that:

(A) The statement is offered as evidence of a material

fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

This court also cited Chambers v. Mississippi, 410 U. S. 284, wherein the United States Supreme Court ruled that the hearsay rules may not be applied to defeat the ends of justice.

This Honorable Court stated in Demby, Supra, that few rights are more fundamental than that of an accused to present witnesses in his own defense, and, if there is some corroboration to support the statement, the evidence should be presented to the trier of fact.

Further, in People v. Barrera, Mich. Supr., 547 N. W. 2d 380, 289, it was held that a defendant's constitutional right to present exculpatory evidence in his defense and the rationale of the admission of reliable evidence must reach a balance. That court viewed it as having an inverse relationship: the more crucial the statement is to the theory of defense, the less corroboration a court may constitutionally require for its admission.

Therefore, as Kovatto was not available at trial the hearsay statements should have been admitted.

By not doing so the Defendant was deprived of his right to

question Kovatto regarding the rental of the car. And, had Kovatto denied renting Defendant the car the testimony of other witnesses could have been presented at trial.

CONCLUSION

The Defendant's right to a fair trial was denied when he was not allowed to introduce hearsay evidence after his constitutional rights to confront and cross-examine the victim, Rocco Kovatto, who was not present for trial, were denied.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Elton Pumphrey : No. 4,2001
Defendant Below, :
Appellant,
vs. :
STATE OF DELAWARE :
Plaintiff Below, :
Appellee.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I caused to be mailed, United States postage Prepaid, two (2) true copies of the within APPELLANT'S OPENING BRIEF ON APPEAL and APPENDIX TO APPELLANT'S OPENING BRIEF ON APPEAL, this 2 day of July, A. D. 2001, to:

Elton Pumphrey
SBI No. 185250
Building PT-5-511
Sussex Correctional Institution
P.O. Box 500
Georgetown, DE 19947

John Williams, Esquire
Department of Justice
Sykes Building
45 The Green
Dover, DE 19901


Thomas D. H. Barnett, Esquire
I. D. No. 0994
512 East Market Street
Georgetown, DE 19947
(302) 855-9252

DATED: 6-29-01

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE

VS.

ELTON L PUMPHREY

Alias: See attached list of alias names.

DOB: 03/14/1968
SBI: 00185250

CASE NUMBER:
0002014519

CRIMINAL ACTION NUMBER:
IS00-04-0160
THEFT \$1000 OR>(F)
IS00-04-0161
CONSP 2ND(F)
IS00-04-0162
AUTH FOR PHO FP(M)

SENTENCE ORDER

NOW THIS 15TH DAY OF DECEMBER, 2000, IT IS THE ORDER OF
THE COURT THAT:

Effective December 15, 2000 the defendant is sentenced as follows:

The defendant is adjudged guilty of the offense(s) charged.
The defendant is to pay the costs of prosecution and all
statutory surcharges.

AS TO IS00-04-0160 : TIS

The defendant shall pay his/her restitution as follows:
See attached list of Payees.

The defendant is placed in the custody of the
Department of Correction for 2 year(s) at supervision level
5 with credit for 165 day(s) previously served

- Suspended after serving 6 month(s) at supervision level
5

- For 18 month(s) supervision level 3 DOC DISCRETION

STATE OF DELAWARE

VS.

ELTON L PUMPHREY

DOB: 03/14/1968

SBI: 00185250

Probation is consecutive to any probation now serving

AS TO IS00-04-0161 : TIS

The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 2 year(s) at supervision level 3 DOC DISCRETION

Probation is consecutive to criminal action number 00-04-0160

AS TO IS00-04-0162 : TIS

The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

- Suspended for 6 month(s) at supervision level 3 DOC DISCRETION

- Then 6 month(s) supervision level 2

Probation is consecutive to criminal action number 00-04-0161

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
ELTON L PUMPHREY
DOB: 03/14/1968
SBI: 00185250

CASE NUMBER:
0002014519

Pay financial obligations during the probationary period.

Perform 5 hour(s) to 35 hours per week of community service while at Level 3

Obtain and remain gainfully employed.

Have no contact with Sydney Artz

Have no contact with Derevia Gray

Have no contact with Daniel Jahn

Have no contact with Rocco Kovatto

Should the defendant be unable to complete financial obligations during the period of probation ordered, the defendant may enter the work referral program until said obligations are satisfied as determined by the Probation Officer.

NOTES

The defendant shall be joint and severally responsible for the restitution, along with co-defendant Derevia Gray, AKA Darlene Smith, should she be adjudicated guilty at a later date.

While at level 5 and on probation, the defendant shall undergo a mental health examination and follow any directions for treatment, testing or counseling made.

While at level 5 and on probation, the defendant shall undergo a substance abuse evaluation and follow any directions for treatment, testing or counseling made.

STATE OF DELAWARE

VS.

ELTON L PUMPHREY

DOB: 03/14/1968

SBI: 00185250

JUDGE E. SCOTT BRADLEY

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
ELTON L PUMPHREY
DOB: 03/14/1968
SBI: 00185250

CASE NUMBER:
0002014519

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED

TOTAL CIVIL PENALTY ORDERED

TOTAL DRUG REHAB. TREAT. ED. ORDERED

TOTAL EXTRADITION ORDERED

TOTAL FINE AMOUNT ORDERED

FORENSIC FINE ORDERED

RESTITUTION ORDERED 6446.50

SHERIFF, NCCO ORDERED

SHERIFF, KENT ORDERED

SHERIFF, SUSSEX ORDERED 150.00

PUBLIC DEF, FEE ORDERED 50.00

PROSECUTION FEE ORDERED 290.00

VICTIM'S COM ORDERED

VIDEOPHONE FEE ORDERED 3.00

TOTAL 6,939.50

RESTITUTION SUMMARY

STATE OF DELAWARE

VS.

ELTON L PUMPHREY

DOB: 03/14/1968

SBI: 00185250

CASE NUMBER:

0002014519

AS TO IS00-04-0160 :

The defendant shall pay restitution as follows:

\$ 1753.00 to SYDNEY ARZT

\$ 4693.50 to NATIONWIDE INSURANCE

LIST OF ALIAS NAMES

STATE OF DELAWARE

VS.

ELTON L PUMPHREY

DOB: 03/14/1968

SBI: 00185250

CASE NUMBER:

0002014519

ELTON L PUMPHREY

ELTON L PUMPHREY

ELTON L PUMPHREY

ELTON PUMPHREY

ELTON L PUMPHREY

ELTON PUMPHREY

ELTON L PUMPHREY

1 **P** **R** **O** **C** **E** **E** **D** **I** **N** **G** **S**

2 (The following proceedings were had in

4 THE COURT: What is up?

5 MS. STEINER: We have a trial today, as you
6 know. It is a robbery trial on four charges, I think.

9 MS. STEINER: The robbery charges --

10 THE COURT: Assault or violence?

11 MS. STEINER: I think charged is ". . . used
12 force or threatened to use force or cause physical
13 injury." I don't think the stick is in the indictment.

14 THE COURT: Isn't that the deadly weapon?

15 MS. STEINER: You don't need a deadly weapon
16 for robbery first.

17 MR. BARNETT: You do for possession of a
18 deadly weapon during the commission of a felony.

19 MS. STEINER: In any event, the victim of
20 this alleged robbery is not here. His name is Rocco
21 Kovatto, K-o-v-a-t-t-o. My last communication with him
22 was last week.

23 Prior to that, I had requested a continuance

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

B-8

1 because I received information that he was checking
2 himself into a rehab facility. I asked for a
3 continuance for that reason and Mr. Barnett did not
4 object, but the continuance request was denied.

5 THE COURT: By?

6 MS. STEINER: Case Scheduling, I guess. I
7 did not follow up with an additional request because,
8 in the meantime, I heard from Mr. Kovatto, wherever he
9 was. He was not in the State of Delaware. He had been
10 in the State of Delaware up until this point, from my
11 understanding, because I had periodic communication
12 with him. Several co-defendants' trials were coming up
13 and being bumped. So I had communication with him.

14 My last communication with him, I believe,
15 was last Tuesday, and he indicated to me he was
16 checking himself into a facility. Initially, my
17 information was that he was in Pennsylvania. When I
18 spoke with him, he was in New Jersey because the number
19 I had was a 609.

20 He told me that he was checking himself into
21 a facility that day, but that they were going to allow
22 him -- they knew he had this trial and he was going to
23 be permitted to come down here to testify for this

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1 trial. He was going to take the Cape May ferry. We
2 had a conversation about how he was going to get here
3 when he needed to be here.

4 THE COURT: What is the nature of the
5 facility or his problem?

6 MS. STEINER: He tells me it is alcohol. But
7 I have no way of knowing, and I couldn't get that
8 information, even if I tried.

9 THE COURT: All right.

10 MS. STEINER: He tells me he has an alcohol
11 problem. That is why he is where he supposedly is. I
12 don't know where he is. But I am just representing --

13 THE COURT: You thought he would be here?

14 MS. STEINER: Because I talked with him and
15 he assured me he knew this trial was this Tuesday and
16 the co-defendant is the 31st, on Halloween. He knew he
17 had to be here this Tuesday and the 31st, and I told
18 Mr. Kovatto, "It is probably going to be more than one
19 day. You may need to be here the 24th and 25th and
20 then again the following week."

21 We had conversations about this. He assured
22 me he would be here. We talked about how he was going
23 to be here. I have no explanation as to why he is not

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OFFICIAL COURT REPORTER

B-10

1 here. I have not had any communication with him since
2 last Tuesday, despite efforts to do so. I don't know
3 where he is.

4 He has not been served, because he was not in
5 the State of Delaware at the time last week when the
6 Sheriff's Office presumably was trying to serve some
7 subpoenas. I don't know whether or not there were any
8 efforts made to serve the subpoena on him. Certainly,
9 it was requested by our office, because this is not the
10 first trial for this. So he had been served in the
11 past.

12 But last week, with the issues with the
13 Sheriff's Office, I know that several of my witnesses
14 were not getting subpoenas until Saturday or today. So
15 he has not been served for multiple reasons, probably
16 one of which is that he is presumably out of state.
17 But I have no way of confirming that. All I know is
18 that the last communication I had with him was last
19 Friday.

20 I am prepared to proceed without Mr. Kovatto.
21 I have, I believe, sufficient other evidence to proceed
22 on all of the charges without his presence. I don't
23 intend to get into any statements that he made to

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B-11

1 people.

2 I have another witness who was the witness
3 who made a 911 call. I have a recording of that 911
4 call. I have the individuals who are responsible for
5 maintaining those types of records and the person who
6 was the dispatcher who received the 911 call. I have
7 the police officers to whom this witness made the 911
8 call and made statements that evening and early that
9 morning about what had happened.

10 I have a police officer who when the vehicle,
11 ultimately -- a vehicle was stolen. When the vehicle
12 is recovered, the defendant and another individual whom
13 the witness will identify as having been involved in
14 this process and is taking the car that night, ends up
15 in the car when stopped by another police officer three
16 weeks later.

17 I have a photograph of the victim and his
18 injuries that was taken by a police officer. I have a
19 paramedic who transported the victim to the hospital
20 and can testify about the nature of his injuries.

21 THE COURT: All right.

22 MS. STEINER: I am prepared to go forward
23 without him. I believe Mr. Barnett has some issues

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B-12

1 about that.

2 MR. BARNETT: I have a right to confront and
3 cross-examine the victim. There is an allegation of a
4 robbery. Who is going to testify that he was robbed?
5 Who is going to testify as to who hit him? None of the
6 witnesses are going to be able to testify to that.

7 There are inconsistent statements in the
8 victim's testimony at the preliminary hearing. There
9 are inconsistent statements in the police report. Part
10 of my evidence can only be gotten in on rebuttal, and I
11 need the victim here to ask him those questions before
12 I can present my witnesses.

13 There is no way that the State can go forward
14 and give my client a fair trial without the victim
15 being here. He has a constitutional right to confront
16 and cross-examine his accuser.

17 How are we going to get in his statement that
18 he was robbed? It is hearsay. The officer can't
19 testify to police report information without the victim
20 being here to confirm it and testify to it, and we
21 don't have that, Your Honor. How in the world can the
22 State hold my client up and make him face up to twenty
23 years in prison without giving him that basic right?

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B-13

1 The State can't go forward on this without him.

2 I did not object to the continuance request
3 the first time. My client has instructed me that I was
4 in error and I should have objected. He is raising the
5 devil me because I did not.

6 I understand the State's position. I have
7 been there before when I was on the other side. But
8 there are some cases you just have to bite the bullet.
9 They asked for a continuance. They didn't get it. I
10 had to pay a private process server to serve my
11 subpoenas for this trial. Because of the problems with
12 the Sheriff's Department, I didn't know if they would
13 get out there and do it.

14 This is just a basic constitutional issue. I
15 have a right to have this victim here and confront him
16 about what happened that night. Not to just have the
17 State come in here with two or three peripheral
18 witnesses and try my client for robbery.

19 MS. STEINER: I disagree that he has a
20 constitutional right to cross-examine the victim. What
21 if the victim had been killed in a car accident
22 subsequent to this happening and was dead?

23 THE COURT: What, if any, statements are we

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B-14

1 going to hear?

2 MS. STEINER: I have no intention of
3 introducing any statements of the victim. I intend to
4 introduce a photograph of him and injuries which are
5 visible in the photograph. The witness who observes
6 what is happening and observes people around the victim
7 and then obtaining keys and stealing the car, which the
8 defendant and the same girl who this witness identifies
9 as being there the night of this incident, three weeks
10 later, end up in the car.

11 MR. BARNETT: Again, my witnesses are going
12 to be rebuttal in nature and they are going to testify
13 -- and I will proffer it for the record -- that
14 Mr. Kovatto, in fact, rented his car on a regular basis
15 for money and for drugs in that area. But the only way
16 I can get that in is for him to say he has never done
17 it. And he says he has never done it in the police
18 reports and in the preliminary hearing.

19 But that's all not going to come in, so my
20 evidence can't come in. I am sitting over here with my
21 thumb in my ear, to make it a little nicer paraphrase,
22 while my client gets on the railroad to prison, and I
23 have no case because the victim has chosen not to

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B-15

1 appear.

2 MS. STEINER: I don't know that I can say
3 that he has chosen not to appear. Assuming he did
4 check himself into a rehab facility, from what I know
5 of rehab facilities, I don't know whether he would be
6 able to come. He says he would have been able to come
7 down here, but I don't know whether he would or not. I
8 don't know if he would have any transportation. I
9 don't know where he is.

10 In my last communication, he assured me he
11 would be here, but he is not. I have no explanation.
12 He has not been served despite efforts to do so and
13 despite communications with him. I feel I can proceed
14 with what I have on this case.

15 THE COURT: Did you try to subpoena the
16 victim?

17 MR. BARNETT: No. I didn't find out where
18 the victim is. He is in a rehab. All I can do is rely
19 on what Paula has told me. The fact is that it is not
20 my duty to subpoena him to start with. But even had I
21 known where he was -- and, yes, I would have subpoenaed
22 him -- Mr. Kovatto is not in the state. The fact still
23 remains that the State had this case for a long time

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B-16

1 and these subpoenas didn't have to wait until the last
2 minute.

3 MS. STEINER: They didn't wait until the last
4 minute.

5 MR. BARNETT: They could have served him
6 before he left the State. The second thing is if
7 Mr. Kovatto calls and says he is going to appear, then
8 I assume the presumption is rehab is going to let him
9 appear.

10 But all of that aside, I am put in a position
11 that the State has brought a charge of robbery and now
12 they are going to try to show similar evidence to prove
13 that robbery without a victim's statement that, number
14 one, he was robbed; number two, that he was injured;
15 number three, who injured him; and, number four, that
16 he never lent his car out and this car was stolen, the
17 car he was driving. It is not even his car. He
18 borrowed the car from someone else.

19 MS. STEINER: The State submits the injuries
20 to Mr. Kovatto belie that he voluntarily rented a car
21 to anyone.

22 MR. BARNETT: Not necessarily. He could have
23 been in an argument later. I mean, all of this should

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B-17

1 come out in a trial -- not here in chambers -- if we
2 are going to suppose. But the key is that my case is
3 dead in the water without the victim, and I don't see
4 how the State can proceed without the victim, because I
5 have a right or my client has a right to confront and
6 cross-examine his accuser. That is a basic tenet of
7 criminal law.

8 THE COURT: I think the State is free to
9 select which witnesses it wants to present, and if it
10 doesn't want to present a particular witness -- in this
11 case the victim -- or can't present it, I think that
12 that is certainly within the State's discretion. We
13 are not going to hear testimony from this victim in
14 some other form if the victim is not going to be here,
15 so I don't think you have confrontational issues.

16 MR. BARNETT: Sure I do. Someone has to make
17 a complaint of a robbery. That complaint was made by
18 Mr. Kovatto. Without Mr. Kovatto's getting on the
19 stand and saying, "I was robbed, and that man robbed
20 me," then how does the evidence of any robbery get in,
21 no matter what happened? What we are left with is we
22 may have a fight.

23 THE COURT: I would think that the absence of

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B-18

1 that testimony would please your client.

2 MR. BARNETT: It doesn't please my client or
3 me that I have to go to trial without being able to
4 present my entire case. It is a crap-shoot, obviously.

5 THE COURT: What is it you want to present
6 that you don't think you will be able to because the
7 victim is not here?

8 MR. BARNETT: I have one witness who will
9 testify that the car was rented to my client that
10 night, and I think I can get that in. I have three
11 other witnesses that I may not be able to get in
12 without the rebuttal.

13 THE COURT: What kind of testimony might they
14 offer?

15 MR. BARNETT: That Mr. Kovatto regularly came
16 to West Rehoboth and traded his car for drugs.

17 MS. STEINER: Which I would object to anyway,
18 being able to get into specific instances of character
19 and conduct.

20 MR. BARNETT: The night of the incident is
21 the one witness I have who saw that. Mr. Kovatto has
22 denied in prior testimony that he ever rented his car
23 to anybody, and he also denied using drugs, and that

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B-19

1 bears on his credibility. And, obviously, if he says,
2 "I don't use drugs," I have a right to bring somebody
3 in who saw him use drugs on rebuttal.

4 THE COURT: Whether he used the drugs or
5 didn't use drugs, what does that show? If he did use
6 drugs, what does that show?

7 MR. BARNETT: It shows credibility. He
8 denied that he used drugs. He denied he used drugs
9 that night. I have a witness who is going to say he
10 traded his car for drugs that night.

11 THE COURT: But he is not going to testify.

12 MR. BARNETT: Mr. Kovatto isn't.

13 THE COURT: So his credibility is not at
14 issue.

15 MR. BARNETT: Right. But the issue is that
16 the car was rented.

17 THE COURT: You have one witness who will say
18 that Mr. Kovatto rented that car that night to your
19 client?

20 MR. BARNETT: Yes. That is my whole case.
21 That's it.

22 THE COURT: We won't ask why your client
23 allegedly hit him and took his money.

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OFFICIAL COURT REPORTER

B-20

1 MR. BARNETT: Well, this witness is also
2 going to say he didn't have any money that night.
3 That's why he rented the car.

4 THE COURT: I assume your ultimate request is
5 you want a continuance?

6 MR. BARNETT: No.

7 THE COURT: Or what? What is your --

8 MR. BARNETT: I don't believe the State can
9 proceed without the victim and giving me the right to
10 confront and cross-examine him.

11 MS. STEINER: How could you ever prosecute a
12 murder case, if that is your argument?

13 MR. BARNETT: That is different. The witness
14 is available.

15 THE COURT: What about if the victim changed
16 their mind and refused to testify?

17 MR. BARNETT: Then if they did that, they
18 would be able to get in their prior statements under
19 the Rules.

20 MS. STEINER: That happens all the time in
21 the domestic violence cases where witnesses recant.

22 THE COURT: I don't think the State has an
23 obligation to put the witness on in order to proceed.

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B-21

1 If that is the basis, I will deny that. It is the
2 State's burden, and the State can sustain its burden in
3 any permissible way. I would think you would be
4 pleased that the victim is not going to be here to
5 testify. I would think you would be pleased.

6 I may be wrong. But I am not aware of any
7 obligation that the State has to produce any particular
8 witness.

9 MR. BARNETT: Can I have a few minutes to go
10 down and talk to my client to let him know what is
11 going on?

12 THE COURT: Yes.

13 (Whereupon, after a brief recess, the
14 Court reconvened in open court and the following
15 proceedings were had:)

16 THE CLERK: We are about to select a jury in
17 the case of State of Delaware against Elton L.
18 Pumphrey. This is a criminal case, and the charges
19 against the defendant are robbery in the first degree;
20 possession of a deadly weapon during the commission of
21 a felony; theft; conspiracy in the second degree; and
22 failure to submit to photographs and fingerprints. It
23 is alleged that the offenses occurred in Sussex County

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B-22

CONTINUANCE REQUEST FORM

CSO
14Trial Case Review County: SussexState vs. Elton FlumphreyArrest Date 3-16-00 Detained: yes/noCriminal Action # 0008014519 Defendant ID# 00-04-0158 # of prior reschedulings 1Scheduled Date 10-24-00 Requested date 10-4-00 OPPOSING COUNSEL: Opp. Agree

REQUESTED BY:

 Deputy Paula Ryan Steiner
Print NamePaula Ryan Steiner 10-4-00
Signature/Date Defense Thomas D.H. Barnett
Print Name

Signature/Date

REASON(S): A necessary witness for the State failed and stated he was in a Detox program for 165 days in Uversville, PA and will not be available to testify.2010 OCT -6 PM 2:20
FILED
CLERK'S OFFICE
SUSSEX COUNTY
WYOMING
PA

IF CONTINUANCE REQUEST IS DUE TO SCHEDULING CONFLICT WITH ANOTHER COURT APPEARANCE:

Court and County: _____ Case Name: _____

Case ID No.: _____ Time: _____ Judge: _____

Date the other appearance date was selected: _____

NOTICE: It is the responsibility of the submitting party to send a copy of this request to opposing counsel. In the event of approval of this request, it is the responsibility of the attorneys to notify their clients and witnesses of the new date.

FOR ADMINISTRATIVE USE ONLY:

Recommendation: Approve Deny Charge to: State Defense Court

Comments: _____

COURT ACTION: Approve Deny Charge to: State Defense CourtComments: Continuance request is denied. Request was filed outside of 15 day guideline period. Date has been established since 8/1/00. Defendant is also incarcerated on these charges. Has an arrest date of 3/16/00.
Judge: L. Rumenter Date: 10/12/00.Steiner
Barnett
Proth

EXHIBIT

e Clerk
DEPARTMENT OF SUPERIOR COURT
100 JET 26 fil 3: 78
#28

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES HOLLAND,

No. 550, 1998

DEPUTY CLERK
WILMINGTONDefendant-Below,
Appellant,Court Below—Superior Court of
the State of Delaware in and for
New Castle County

v.

Cr. A. No. IN98031820

STATE OF DELAWARE,

Plaintiff-Below,
Appellee.

Submitted: November 30, 1999

Decided: January 26, 2000

Before **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices.Upon appeal from the Superior Court. **REVERSED**.Raymond J. Otlowski, Esquire, Assistant Public Defender, Wilmington,
for Appellant.Timothy J. Donovan, Jr., Esquire, Deputy Attorney General, Wilmington,
for Appellee.**VEASEY**, Chief Justice:

EXHIBIT (2)

In this appeal we reverse a judgment entered on a conviction of conspiracy to commit second degree assault. The problem here is that the jury disagreed on the second degree assault charge, the underlying overt act. A mistrial on that charge was declared because of the hung jury. Since the indictment did not charge that a person other than the defendant committed the overt act, and there was no conviction of the defendant on that charge, the conviction on the conspiracy charge cannot stand. This case is legally indistinguishable from our prior jurisprudence holding that there cannot be a conspiracy conviction where there has been an acquittal of the same defendant on the overt act.

Facts

It appears to the Court from the briefs and parties' arguments on appeal that the facts of this case are as follows. On the evening of November 28, 1997, three men attacked Arvel Nesmith as he was talking to his girlfriend on the sidewalk of East Eleventh Street in Wilmington. The three men walked past Nesmith and stopped to engage in a whispered conversation. One of the men approached Nesmith and pulled a gun out of his waistband. Nesmith's girlfriend managed to run away, but one of the other men grabbed Nesmith from behind causing him to fall to the ground. Nesmith recognized the man who grabbed him as a childhood

acquaintance, who was eventually identified as James Holland. The three men then proceeded to beat Nesmith over the head and body before fleeing.

The State indicted Holland on one count of second degree assault, one count of possession of a firearm, and one count of second degree conspiracy.¹ After hearing the evidence, the jury was unable to reach a verdict on any of the three counts. Over the objection of Holland's counsel, the trial court gave the jury an *Allen* charge,² a supplemental instruction encouraging the jury to reach a verdict. The jury remained hung on the first two charges, but reached a guilty verdict on the count of second degree conspiracy. Holland now appeals to this Court, claiming that his conviction for second degree conspiracy is invalid absent a conviction for the underlying overt act.

Analysis

A jury's guilty verdict on a conspiracy charge and an acquittal on the underlying felony are not always legally inconsistent verdicts under Delaware law.³

¹ Count III of the Indictment states in pertinent part that Holland "when intending to promote the commission of a Felony, did agree with 2 unknown conspirators to engage in conduct constituting a felony of Assault Second Degree and *did commit an overt act in furtherance of said conspiracy, by committing Assault Second Degree as set forth in Count I of this indictment. . . .*" (Holland Indictment 3/30/98, at 2) (emphasis added).

² See *Allen v. United States*, 164 U.S. 492 (1896).

³ See *Robertson v. State*, Del. Supr., 630 A.2d 1084, 1095 (1993); *Alston v. State*, Del. Supr., 554 A.2d 304, 312 (1989).

Under Delaware law, it is not necessary for a defendant to commit the overt act underlying the conspiracy charge.⁴ It is sufficient that a co-conspirator commit the overt act.⁵ When the only overt act alleged is the underlying substantive crime, a defendant's acquittal on this charge negates the overt act element of a conspiracy charge unless a co-conspirator committed the overt act.

In *Johnson v. State*, this Court reversed a conspiracy conviction where a defendant had been acquitted of the "overt act," third degree burglary.⁶ We reasoned that the defendant could not be convicted of conspiracy because there was no allegation that the overt act was committed by a co-defendant or co-conspirator.⁷

⁴ 11 Del. C. § 512 provides:

A person is guilty of conspiracy in the second degree when, intending to promote or facilitate the commission of a felony, the person:

(1) Agrees with another person or persons that they or 1 or more of them will engage in conduct constituting the felony or an attempt or solicitation to commit the felony; or

(2) Agrees to aid another person or persons in the planning or commission of the felony or an attempt or solicitation to commit the felony; and *the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.* (emphasis added).

⁵ See *Stewart v. State*, Del. Supr., 437 A.2d 153, 156 (1981); *Alston*, 554 A.2d at 312.

⁶ Del. Supr., 409 A.2d 1043, 1044 (1979).

⁷ See *id.*

In *Robertson, Alston, and Stewart*, this Court faced the same issue, but addressed a slightly different factual scenario.⁸ Unlike *Johnson*, the overt act was alleged to have been committed by a conspirator other than the defendant.⁹ Despite defendant's acquittal on the underlying charge or overt act, we upheld conspiracy charges in all three cases. These cases stand for the proposition that a conspiracy conviction is not legally inconsistent with an acquittal because a "conviction is sustainable" whether a defendant "or another person with whom he conspired commits an overt act in furtherance of the conspiracy."¹⁰

This Case

In this case, the jury found Holland guilty of conspiracy in the second degree, but there was a hung jury on the count of second degree assault, the underlying overt act. Thus, this case does not involve inconsistent verdicts, but a verdict and a non-verdict. This distinction, however, is of no consequence because the State failed to prove beyond a reasonable doubt that Holland committed second degree assault in Count I of the Indictment. As a result, the State concomitantly failed to prove that

⁸ See *Robertson*, 630 A.2d at 1095; *Alston*, 554 A.2d at 311-12; *Stewart*, 437 A.2d at 156-57.

⁹ See *Johnson*, 409 A.2d at 1044.

¹⁰ *Stewart*, 437 A.2d at 156-157; see also *Robertson*, 630 A.2d at 1095; *Alston*, 554 A.2d at 311-12;

Holland committed the overt act necessary to sustain the conspiracy charged in Count III of the Indictment.¹¹ Paralleling the factual scenario presented in *Johnson*, the indictment in this case did not allege that a conspirator, other than Holland, committed the overt act of assault in the second degree.¹² Therefore, we conclude that Holland's conviction of conspiracy in the second degree was reversible error.

Conclusion

On the basis of the foregoing, we conclude that the conspiracy conviction and the hung jury on the underlying substantive crime are legally inconsistent and therefore we reverse the judgment of the Superior Court.

¹¹ See 11 Del. C. § 301(b). 11 Del. C. § 301(b) provides in pertinent part: "No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt."

¹² See *Johnson*, 409 A.2d at 1044.